

STATEMENT AS TO JURISDICTION, FILED JANUARY 18, 1944

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on December 20, 1943, sustaining a demurrer to the indictment therein. Petition for appeal was filed on January 18, 1944, and is presented to the District Court herewith, to wit, on January 18, 1944.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401); 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

Section 19 of the Criminal Code, 18 U. S. C. 51, provides in pertinent part as follows:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States,

or because of his having so exercised the same * * * they shall be fined not more than \$5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

THE ISSUE AND THE RULING BELOW

The defendants, Clarence Poer, Sidney Solomon Pope, Odell James Shepherd, and Verlin Fee, were indicted at the November 1943 Term of the United States District Court for the Eastern District of Kentucky at London, Kentucky, for conspiracy to deprive qualified voters, at an election held on November 3, 1942, for the purpose of electing a United States Senator, of their right to have their ballots "freely and fairly cast, counted and certified and accorded and given full value and effect," in violation of Section 19 of the Criminal Code (18 U. S. C. 51). The indictment alleged that the defendants Clarence Poer and Sidney Solomon Pope acted as the duly appointed and qualified judges of said election in Pansy Precinct No. 53-A, Harlan County, Kentucky, and that the defendants Odell James Shepherd and Verlin Fee acted as the duly appointed clerk and sheriff, respectively, of said election in said precinct. After setting forth that many persons, who were citizens and residents of the United States and of Harlan County, Kentucky, were en-

titled by the laws of Kentucky and the Constitution of the United States to vote at said election, in said precinct, for a duly qualified candidate for United States Senator, and that such persons did vote for a duly qualified person who was the Republican candidate for United States Senator, the indictment charged that the defendants "did unlawfully, wilfully, knowingly and feloniously conspire" to deprive such persons of the free exercise and enjoyment of the rights and privileges secured to them by the Constitution of the United States, in that the defendants did agree to, and did, remove a large number of ballots from the official stub, poll and ballot book, and mark and vote the same for the Democratic candidate for United States Senator, forge and write the name of some fictitious voter on the stub book at the place where each of such ballots had been removed, and make a false and fraudulent return of said ballots, stubs, and ballot book to the County Clerk's Office to be delivered to the County Board of Election Commissioners, with the effect of causing the Board of Election Commissioners "to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate." This, the indictment charged, "impaired, lessened, diminished, diluted and destroyed the integrity and effectiveness of the ballots and choice of said voters who had voted for the Republican candidate."

The defendants demurred to the indictment on the ground, *inter alia*, that it does not state facts sufficient to constitute a crime against the United States.

In sustaining the demurrer the District Court held that Section 19 of the Criminal Code "as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants." In a supplemental memorandum, the purpose of which was "to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of Section 19 of the Criminal Code" the District Court ruled that there is "no federal statute which covers the reprehensible election fraud commonly referred to as 'ballot box stuffing,'" and that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is not a Constitutional right to which Congress intended to afford protection by the provisions of Section 19 of the Criminal Code of the United States." The District Court regarded the case of *United States v. Bathgate*, 246 U. S. 220, as controlling.

Since the District Court thus ruled that the facts alleged in the indictment do not fall within the purview of Section 19, and moreover, expressly

acknowledged that this ruling "was based solely" upon a construction of the statute, the ruling is subject to review by the Supreme Court on direct appeal. *United States v. Lepowitch*, 318 U. S. 702, 703-704; *United States v. Classic*, 313 U. S. 299, 309; *United States v. Kapp*, 302 U. S. 214, 217; *United States v. Birdsall*, 233 U. S. 223, 230; *United States v. Patton*, 226 U. S. 525, 535; *United States v. Heinze*, 218 U. S. 532, 540; *United States v. Stevenson*, 215 U. S. 190, 194-195.

THE QUESTION IS SUBSTANTIAL

We believe that the District Court erred in holding that section 19 of the Criminal Code affords no protection to citizens from having the value of their lawfully cast votes at Congressional elections lessened by acts of election officials in stuffing ballot boxes with fictitious and forged ballots. Such a construction of the statute is inconsistent with the sweep of its language, and is not required by the decisions of the Supreme Court thereunder.

The right to vote for members of Congress, as provided by state or supervening federal laws, is a right guaranteed by the Constitution (Art. 1 § 2; 17th Amend.), and is therefore a right in which citizens are secured by section 19 of the Criminal Code. *United States v. Classic*, 313 U. S.

¹ The conspiracy condemned by section 19 is one to oppress "any citizen" in the enjoyment of a right "secured to him" by the Constitution or laws of the United States.

299, 314, *Ex parte Yarbrough*, 110 U. S. 651. In *United States v. Mosley*, 238 U. S. 383, the Court held that a qualified voter has not only the right to cast his vote, but also the right to have his vote counted, and that therefore section 19 covers a conspiracy to omit duly cast votes from the count. The majority of the Court was of the opinion that the repeal in 1894 (28 Stat. 36), of the sections of the Enforcement Act of 1870 (16 Stat. 140) punishing specific acts of interference with the elective franchise, did not have the effect of depriving citizens of the general protection afforded by section 19 of the Criminal Code.²

On the other hand, in *United States v. Bathgate* 246 U. S. 220, the Court held that section 19 does not cover a conspiracy to bribe voters.³ The Court distinguished between the personal right to vote which is within the protection of section 19, and the political right common to all "that the public shall be protected against harmful acts," which it held was not within the protection of section 19. It further stated that the express repeal in 1894, of the provisions of the Enforce-

² The decision in *United States v. Classic*, 313 U. S. 299, reaches the same result with respect to a failure to count votes cast in a primary election, where the primary is an integral part of the election machinery or is decisive of the result of the subsequent election.

³ The Court had previously held in *United States v. Gradowell*, 243 U. S. 476, that section 19 does not apply to a conspiracy to deprive candidates, by means of bribery, of a right to nomination in a primary election.

ment Act of 1870 punishing bribery, supported the view that bribery does not come within the purview of section 19. As previously noted, the District Court in the present case regarded the *Bathgate* case as controlling.

However, the facts of the present case come much closer to the *Mosley* than to the *Bathgate* situation. The indictment does not charge general injury to the common right of all citizens to honest elections, but a specific injury to the right of those citizens whose ballots cast for their candidate were lessened in value by the casting of fraudulent and fictitious ballots for the opposing candidate. Stuffing of ballot boxes may not always deprive a citizen of his vote as directly and completely as does failure to count his vote, but it has a more direct and more readily ascertainable effect on that vote than does bribery of other voters. It would be almost impossible to prove the actual effect of bribery in decreasing the value of any particular vote, since it would be necessary to determine how many voters actually changed their votes in consequence of the bribes. In the case of ballot-box stuffing, however, the mathematical effect upon the quantitative value of an individual vote is readily determinable. If one hundred qualified persons vote in a district, each vote has a weight of one one-hundredth; and if one hundred fictitious ballots are added, the value of each vote is reduced to one two-hundredths.

Where the effect is to change the outcome of the election, each voter for the losing candidate is deprived of the whole value of his vote, and all voters at the election are deprived of their right of representation by the majority's choicer, as effectively as though the majority's votes had not been counted at all. In the ultimate result, it makes no difference to an individual voter whether his vote is not counted at all or is diminished in value to the point of insignificance by false and fictitious ballots. The situation in the present case seems therefore to fall within the rule of the *Mosley* case.

The question presented by this case is substantial and of large public importance, for it concerns the construction of section 19 in its application to offenses, of a recurring type, to rights secured to large numbers of citizens by the Constitution of the United States.

Appended hereto is a copy of the order of the District Court entered on December 20, 1943, and a copy of its supplemental memorandum in reference thereto, filed as a part of the record in this case on January 6, 1944.

Respectfully submitted,

CHARLES FAHY,

Solicitor General.

JOHN T. METCALF,

*United States Attorney for the
Eastern District of Kentucky.*

APPENDAGE FILED JANUARY 18, 1944**ORDER ENTERED AND FILED DECEMBER 20, 1943.**

This cause coming on to be heard upon the defendants' demurrer to the indictment herein, briefs having been considered and the Court having heard oral arguments thereon, is of the opinion that Section 51 of Title 18, United States Code Annotated (Section 19, Criminal Code) upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants herein, and it is therefore, ordered that the demurrer be, and it is hereby sustained, to which ruling the plaintiff, United States of America, objects and excepts.

H. CHURCH FORD,
Judge.

DECEMBER 20, 1943.

APPENDAGE FILED JANUARY 18, 1944

MEMORANDUM FILED JANUARY 6, 1944

On December 20, 1943, an order was entered sustaining a demurrer to the indictment herein.

The purpose of this memorandum is to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code, 18 U. S. C. A. § 51, the statute upon which the indictment is founded.

The general allegations of the indictment are, in substance, that an election was held in Pansy precinct No. 53-A, Harlan County, Kentucky, on the 3d day of November, 1942, for the purpose of electing a United States Senator at which many legally qualified citizens and residents of that precinct cast their votes; that defendants who were the election officers, unlawfully conspired with each other, and with other persons whose names are to the grand jury unknown, to injure and oppress divers citizens, qualified voters of the precinct, in the free exercise and enjoyment of rights and privileges guaranteed and secured to them by the Constitution and laws of the United States. These general allegations are followed by a specific description of the particular acts charged to constitute the alleged crime as follows:

* * * * the said defendants then and there * * * did unlawfully, willfully,

knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a large number of blank and unvoted ballots and to then and there mark, forge and vote the same for the candidate of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely and fairly cast, counted and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal ballots of the aforesaid voters said false, forged and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified and constitute a part of the total vote as recorded and returned by them as officers of the election in said precinct at said election so as thereby to diminish, impair, dilute and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct."

The overt acts alleged are that at the time and place of the Congressional election described in the indictment, the defendants, as officers of the election, conducted it in the exercise of their respective official duties; that they illegally and cor-

ruptly removed a large number of ballots from the official ballot book and forged and voted them for the Democratic candidate for the office of Senator of the United States and deposited them in the ~~bal~~ lot box which they delivered to the County Clerk's Office at Harlan, Harlan County, Kentucky, to be delivered to and counted by the County Board of Election Commissioners, and that they, "by reason of the wrongful, fraudulent acts aforesaid, unlawfully, wilfully, knowingly, falsely and corruptly caused and induced the Board of Election Commissioners of Harlan County, Kentucky, to count, return and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate."

The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

That the rights of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights "secured by the Constitution" within the meaning of and protected by

section 19 of the Criminal Code, is not open to question, *Ex parte Yarbrough*, 110 U. S. 651; *United States v. Mosley*, 238 U. S. 383. Where a primary election is an integral part of the procedure for choosing a representative in Congress, the same rights of voters are protected by the same statute. *United States v. Classic*, 313 U. S. 299.

But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

In *United States v. Bathgate*, 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy "to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation" and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty or integrity of Congressional elections, but "the right or privilege to be guarded, as indicated both by the language em-

ployed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judiciable one common to all that the public shall be protected against harmful acts, * * *."

The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19 of the Criminal Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as "ballot box stuffing". According to the established policy of Congress, as interpreted by the Supreme Court in the *Bathgate* case, the protection of the public from such type of election crimes is left to State laws. *United States v. Gradwell*, 243 U. S. 476; *Chavez v. United States*, 261 F. 174, (8 Cir.); *United States v. Kantor*, 78 F. (2d) 710 (2 Cir.); *Steedle v. United States* 85 F. (2d) 867, (3 Cir.)

H. CHURCH FORD,

Judge.

JANUARY 6, 1944.

